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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CLARK OIL & REFINING CORPORATION,
Petitioner,

vs.

LEHMAN BROTHERS KUHN LOEB, INC.,
Respondent,

and

UNITED STATES OF AMERICA,
Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 28 U.S.C. §636(c) which empowered a United States Magistrate to enter a final judgment in this case is unconstitutional because it violates Article III of the United Constitution which prohibits non-Article III officers such as magistrates from entering final judgments.

2. Whether the magistrate erred in granting Respond nt's Motion for Summary Judgment under Rule 56 Fed.R.Civ.P. inasmuch as the record shows that there are genuine issues as to material facts.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Clark Oil & Refining Corporation, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered July 11, 1984.

OPINIONS BELOW

The following opinions and orders of the lower courts are included in the Appendix to the Petition:

1. Opinion of the United States Magistrate, rendered on June 20, 1983 (not reported).

2. Opinion of the United States Court of Appeals for the Eighth Circuit, rendered on July 11, 1984, (reported at 739 F.2d 1313 (1984)).

JURISDICTION

The opinion of the Court of Appeals was entered on July 11, 1984. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article III, Section 1 provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

28 U.S.C. §631 provides in relevant part:

> (a) The judges of each United States district court and the district court of the Virgin Islands shall appoint United States magistrates in such numbers and to serve at such locations within the judicial district as the conference may determine under this chapter. In the case of a magistrate appointed by the district court of the Virgin Islands, this chapter shall apply as though the court appointing such magistrate were a United States district court. Where there is more than one judge of a district court, the appointment, whether an original appointment or a reappointment, shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge. Where the conference deems it desirable, a magistrate may be designated to serve in one or more districts adjoining the district for which he is appointed. Such a designation shall be made

by the concurrence of a majority of the judges of each of the district courts involved and shall specify the duties to be performed by the magistrate in the adjoining district or districts.

(e) The appointment of any individual as a full-time magistrate shall be for a term of eight years, and the appointment of any individual as a part-time magistrate shall be for a term of four years....

(i) Removal of a magistrate during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability, but a magistrate's office shall be terminated if the conference determines that the services performed by his office are no longer needed. Removal shall be by the judges of the district dourt for the judicial district in which the magistrate serves; where there is more than one judge of a district court, removal shall not occur unless a majority of all the judges concur in the order of removal; and when there is a tie vote of the judges of the district court on the question of the removal or retention in office of a magistrate, then removal shall be only by a concurrence of a majority of all the judges of the council. In the case of a magistrate appointed under the third sentence of subsection (a) of this section, removal shall not occur unless a majority of all the judges of the appointing district courts concur in the order of removal; and where there is a tie vote on the question of the removal or retention in office of a magistrate, then removal shall be only by a concurrence of a majority of all the judges of the council or councils. Before any order of removal shall be entered, a full specification of the charges shall be furnished to the magistrate, and he shall be accorded by the judge or judges of the removing court, courts, council or councils an opportunity to be heard on the charges.

28 U.S.C. §636 provides in relevant part:

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States Magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of the court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of

appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

STATEMENT OF THE CASE

Respondent, an investment banker, brought a breach of contract suit against Petitioner in April 1982, claiming that Petitioner failed to pay a fee which Respondent alleged it is owed pursuant to the terms of a Retainer Agreement dated October 21, 1980, entered into by Respondent and Petitioner. Respondent alleged in its Complaint that the Retainer Agreement requires Petitioner to pay a fee amounting to .4% of the consideration paid for the acquisition of Petitioner's corporate predecessor by Apex Oil Company ("Apex").

Respondent first heard about Apex directly from Petitioner's chief executive officer who informed Respondent in September 1980 that Apex had purchased approximately 2% of Petitioner's stock and was interested in buying additional shares. Respondent then prepared a "defensive strategy" for Petitioner to employ vis a vis Apex designed to fend off any further purchases of Petitioner's stock by Apex.

In January, 1981, Apex filed a Schedule 13D with the United States Securities and Exchange Commission, disclosing that

through open market purchases it had acquired more than 5% of the issued and outstanding stock of Petitioner. Apex then made a direct written inquiry regarding the possibility of acquiring Petitioner. Respondent prepared a draft of a letter to be sent by Petitioner to Apex rejecting Apex's proposal which was sent to Apex in February, 1981.

At Respondent's suggestion, Petitioner thereupon hired outside legal counsel to assist it in rejecting Apex's overtures and preventing any further purchases of Petitioner's stock. Respondent actively sought a "white knight"—a potential acquiring company which unlike Apex, was acceptable to Petitioner's management and its Board of Directors.

In May, 1981, negotiations began between the Emory Clark Family and Apex. Emory Clark was the Petitioner's founder and he and his family were the then owners of approximately 41% of Petitioner's issued and outstanding stock. These negotiations continued for more than two months unbeknownst to either Petitioner's management or Respondent. On July 14, 1981, at a Special Meeting of Petitioner's Board of Directors, Emory Clark's attorney announced that a tentative agreement had been reached for sale to Apex at $37 per share of the approximate 41% of the company's stock held by the Emory Clark Family. An agreed upon condition of this sale, imposed by the Emory Clark Family, was that Apex offer to all other shareholders of Petitioner the same price per share being offered the Emory Clark Family.

Prior to the announcement of the Apex/Emory Clark family contract at the July 14, 1981 Board meeting, Respondent had reported to the Board on its unsuccessful efforts to find a "white knight". Subsequent to the July 14, 1981 meeting, Respondent continued its search for a "white knight" and reported on its inability to find an alternative suitor at the July 24, 1981 meeting of Petitioner's Board of Directors. With reference to Apex, Respondent had been directed by Petitioner

only to provide a written opinion as to the "fairness" of the $37 per share public tender offer which Apex had agreed to make if the offer was recommended to Petitioner's shareholders by a majority of the Board of Directors.

At the July 31, 1981 Special Meeting of Petitioner's Board of Directors, Respondent presented a "fairness opinion" indicating that Apex's $37 per share offer was "fair". A Board Resolution to recommend the tender offer was adopted. Substantially all the stock of Petitioner not covered by the Apex/Emory Clark Family contracts was acquired by Apex through the tender offer.

Petitioner paid Respondent the balance of its retainer under the Retainer Agreement and had thus paid Respondent a total retainer of $293,000 for merger and acquisition services rendered since July 1979. Petitioner also offered to pay Respondent $250,000 for its "fairness opinion" but this offer was rejected by Respondent who insisted it was owed a .4% commission amounting to $2,082,500.

Respondent filed suit on April 2, 1982 and Petitioner's Answer was filed on May 12, 1982. On September 15, 1982, at a conference directed by the Court pursuant to Rule 16 (Fed.R.Civ.P.) United States District Judge William L. Hungate indicated to Petitioner and Respondent that the parties could consent to trial of the action before a United States Magistrate. On October 25, 1982 the parties filed a Stipulation of Consent for Trial before a United States Magistrate under 28 U.S.C. §636(c). Respondent's Motion for Summary Judgment was sustained by a final judgment entered by a United States Magistrate on June 20, 1983.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit has held in this case that a consensual delegation of authority to a magistrate to try civil cases and to direct the entry of judgments, pursuant to 28 U.S.C. §636(c), is constitutional.

There are "special and important reasons" for a review on writ of certiorari of this holding (Sup.Ct.R.17). Five other federal courts of appeals have upheld the constitutionality of 28 U.S.C. §636(c)[1]. Yet a panel of the Ninth Circuit found to the contrary as have a number of dissenting judges in the various circuits. Circuit Judge Richard S. Arnold, in explaining his decision to dissent in this case, noted that with reference to the other circuits:

> In the face of this increasing weight of authority, it requires more than the normal amount of temerity to disagree. Nevertheless...the issue seems to me so clear and simple, *so basic to the whole theory of a written constitution interpreted by independent judges...*" (739 F.2d at 1319 (emphasis added)).

This decision conflicts with basic constitutional principles and with the decisions of this Court in *United States v. Raddatz,* 447 U.S. 667 (1980); and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982).

The decision also runs counter to decisions of this Court authorizing summary judgment under Fed.R.Civ.P. Rule 56 only when there is no genuine issue as to any material fact. *See Sartor v. Arkansas Natural Gas Corp.,* 321 U.S. 620 (1944); *United States v. Diebold,* 369 U.S. 654 (1962) and *Adickes v. S.M. Kress & Co.,* 398 U.S. 144 (1970).

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[1] *Wharton-Thomas v. United States,* 721 F.2d 922 (3d Cir. 1983); *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.,* 725 F.2d 537 (9th Cir. 1984) (en banc) *reversing* 712 F.2d 1305 (9th Cir. 1983); *Collins v. Foreman,* 729 F.2d 108 (2d Cir. 1984); *Puryear v. Ede's Ltd.,* 731 F.2d 1153 (5th Cir. 1984) and *Goldstein v. Kelleher,* 728 F.2d 32 (1st Cir. 1984). Petitions for certiorari have been filed in *Pacemaker* (No. 83-1873), *Collins* (No. 83-1616) and *Goldstein* (No. 84-5).

ARGUMENT

I. 28 U.S.C. §636(c) which Empowered a United States Magistrate to Enter a Final Judgment in this Case is Unconstitutional Because it Violates Article III of the United States Constitution which Prohibits Non-Article III Officers such as Magistrates from Entering Final Judgments.

The Petitioner bases its challenge to section 636(c) on Article III of the Constitution and on the reasoning expounded in *Pacemaker Diagnostic Clinic v. Instromedix, Inc.*, 712 F.2d 1305 (9th Cir. 1983) (hereinafter *Pacemaker I*). In that case three judges of the Ninth Circuit construed a number of decisions handed down by this Court including *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and concluded that section 636(c) of the Magistrates Act violates Article III of the Constitution because it vests judicial power in courts whose chief officers are not insulated by life tenure and a guarantee that their salaries will not be diminished during their continuance in office. *Pacemaker I* at 1309. The panel further concluded that this grant of power was too extensive to fairly support a characterization of the magistrate as an adjunct of the district court. *Id.* at 1310. The panel also noted tha under section 636(c) magistrates were given the power to adjudicate rights which could not fit within the circumference of a traditional exception to Article III—forums for congressionally created substantive rights. *Id.* at 1310.

The panel in *Pacemaker I* also decided that section 636(c) could neither be saved by analogizing it to an arbitrator's decision nor by declaring the constitutional issue to be one concernig only due process rights which could be waived by the parties. *Id.* at 1310-1312. In addition an argument was rejected which would distinguish section 636(c) from the traditional separation of powers problem because the magistrates remain under the control of the Article III judiciary, the branch whose power is agruably invaded. *Id.* at 1312. Finally, the panel decided that

the availability of appellate review by an Article III court could not cure the constitutional ills it found apparent in section 636(c). *Id.* at 1313.

Pacemaker I was reversed en banc in *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537 (9th Cir., 1984) (hereinafter *Pacemaker II*) and the reasoning of *Pacemaker II* has basically been followed by those other circuits which have upheld the constitutionality of section 636(c) (*Wharton-Thomas, Collins, Goldstein* and *Puryear*). Dissenting opinions in these circuits, as well as three vigorous dissents presented in this case, have supported the conclusion drawn in *Pacemaker I.* The majority below explains its affirmation of section 636(c) by essentially rejecting the analysis presented in *Pacemaker I.* Thus the framework of the *Pacemaker I* opinion remains the proper vehicle for outlining this issue for the Court.

Background

Pacemaker I points out that prior to 1979, magistrates were hearing federal district court cases pursuant to the *implicit* authority of 28 U.S.C. §636(b)(1976) of the Magistrates Act and that constitutional attacks on the role of the magistrate in this process were rejected only because in those instances a district court judge had engaged in a *de novo* review of the proceedings.[2] The addition in 1979 of 28 U.S.C. §636(c) made *explicit* Congressional authority for magistrates to try cases and enter judgments but this amendment to the Magistrates Act failed to specifically require *de novo* review by a district court judge. It is against this background that *Pacemaker I* concludes that 28 U.S.C. §636(c) "cannot pass constitutional muster." 712 F.2d at 1310.

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[2] The constitutionality of 28 U.S.C. §636(b) was upheld on this basis in *United States v. Raddatz*, 447 U.S. 667 (1980); *Britt v. Simi Valley Unified School District*, 708 F.2d 452 (9th Cir. 1983) (per curiam)) and *Coolidge v. Schooner California*, 637 F.2d 1321 (9th Cir. 1981), *cert. denied*, 451 U.S. 1020 (1981).

Exercise of Article III Powers by Magistrates

A central issue raised by *Pacemaker I* is the exercise of judicial power by non-Article III officers. This same issue is extensively dealt with in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 102 S.Ct. 2858 (1982) which held the bankruptcy court system unconstitutional. *Pacemaker I* adopts an analytical approach similar to *Northern Pipeline* in determining that (i) magistrates are not Article III judges (ii) magistrate systems do not qualify as "Article I legislative courts" authorized separately from the Article III system and (iii) magistrates acting under 28 U.S.C. §636(c) are not operating as constitutionally authorized adjuncts of the district court. *Pacemaker I* points out that the magistrate's arguable status as an "adjunct" is constitutionally irrelevant except in two specific situations recognized by this Court in *Northern Pipeline*. *Pacemaker I* explains that §636(c) cannot be justified on the basis that magistrates serving thereunder as adjuncts to the court are adjudicating newly created substantive federal rights. Section 636(c) can also not be justified as a so-called "restricted delegation" of authority to magistrates inasmuch as "under such a restricted delegation, magistrates' functions must be limited in such a way that 'the essential attributes' of judicial power are retained in the Article III Court." (712 F.2d 1305 at 1310 (citing *Northern Pipeline*, 102 S.Ct. at 2976-77)). *Pacemaker I* finds that §636(c) is not properly limited because it allows magistrates, rather than district court judges, to make ultimate decisions and enter final judgments.

Possible Saving Provisions

Pacemaker I thoroughly considers possible constitutional "saving devices" before determining that §636(c) is, in fact, unconstitutional. One such saving device—appellate review—is rejected with citations to *Northern Pipeline* as well as to decisions of this Court in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) and *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

Pacemaker I also provides a detailed discussion of another potential saving device—litigant consent—and concludes that such consent cannot cure the constitutional infirmity of section 636(c). The Eighth Circuit rejects this finding of *Pacemaker I* by relying on the rationale of *Wharton Thomas, Pacemaker II, Collins* and *Goldstein.*

In so doing, the majority below accepts the notion that voluntary litigant consent can constitute a waiver of Article III protection and accepts at face value that such consents have been given voluntarily "pursuant to procedures designed to insulate this choice from influence by either the district judge or the magistrate." (*Id.* at 1315 (citing *Goldstein* at 35)). Yet in this case (as in *Goldstein*), contrary to the provisions of 28 U.S.C. §636(c)(2), the clerk of the court did not inform the parties of the right to consent to the reference. Instead, the district judge directly initiated this point with the parties at a court directed pre-trial conference. In addition, the majority opinion ignores the fact there are certain institutional pressures that have tended to make the reference process potentially coercive rather than truly voluntary. Fed.R.Civ.P. 73(b) which was added to the Federal Rules to address this problem and to implement the so called "blind consent" provision of §636(c)(2) did not become effective until August 1, 1983, many months after the parties in this case entered their "voluntary" consent.

The majority below merely assumes that there is no question as to "voluntary" consent and focuses instead on the extent to which *Wharton-Thomas, Pacemaker, Collins* and *Goldstein* have concluded that such consent cures all constitutional ills. These cases in turn have suggested that the decision of this Court in *Hecker v. Fowler,* 69 U.S. (2 Wall.) 123 (1865) and in *Kimberly v. Arms,* 192 U.S. 512 (1889) establish precedent that, with litigant consent, non-Article III decisionmakers may exercise the judicial power of the United States. In *Hecker,* this Court did approve the entry of judgment of a referee's report where the parties agreed that the report would have the same

force and effect as a judgment of the court. In so ruling, however, this Court noted: "Proceedings of the referee were correct, and *the losing party made no objections to the report.*" 69 U.S. at 133 (emphasis added).

There is no doubt that at the time when the *Hecker* decision was rendered, general practice forbade a referee's report or award from being entered as a judgment until objections, if any, from the losing party were filed and the report was then accepted or rejected by the court. 69 U.S. at 133. The opinion clearly suggests that it was not only the presence of a consent but also the absence of objections to the report from the losing party that were among the "peculiar" circumstances (69 U.S. at 133) upon which this Court made its determination in *Hecker*.

Section 636(c) obviously makes no provision for the losing party to file with a referring district court judge objections to the report of a magistrate before that report is entered as a final judgment. Quite the contrary, the magistrate files no report at all but instead enters a final judgment which can then be reviewed by a judge only by way of appellate proceedings.

In *Kimberly v. Arms,* the Court did affirm the concept of consensual reference but only in order to support this Court's holding therein that:

> [W]hen parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein and report his findings . . . [the master's] determinations are not subject to be set aside and disregarded at the mere discretion of the court. *Id.* at 513.

In other words, *Kimberly* sought to establish the appropriate standard of review to be applied to a master's report by a judge *prior to entry of judgment.* While this Court in *Kimberly* concluded that consensual reference should lessen the review standard to be imposed, it certainly did not suggest that litigant consent removes the constitutional need for judicial review of a master's report much less a magistrate's final judgment.

While it is true that *Hecker* and *Kimberly* are relied upon in the fairly recent First Circuit decision of *DeCosta v. Columbia Broadcasting System, Inc.*, 520 F.2d 499 (1st Cir. 1975), *DeCosta* deals with a consensual reference made under §636(b) of the Magistrates Act rather than §636(c). In fact, *DeCosta* was handed down before §636(c) was even made a part of the Magistrates Act. The differences between *DeCosta* and the situation facing this Court are even more striking when the facts of *DeCosta* are considered. In *DeCosta* the parties made a consensual reference to a magistrate for hearing and determination. The magistrate heard the matter and then filed a report with the district court setting forth his findings of fact and conclusions of law. The referring district court judge reviewed and affirmed the report and decision of the magistrate. It was the district court judge who then, having made his review, entered the final and appealable judgment of the court.[3] On appeal the First Circuit considered both the propriety of the reference to the magistrate as well as the appropriate standard of review to be applied by the referring district court and judge *prior to* entry of final judgment by the judge. The propriety of such referrals is, however, not the constitutional issue raised by *Pacemaker I* but the issue rather is the failure of §636(c) to provide for *any judicial review* of a magistrate's decision prior to the *magistrate himself entering a final judgment*. While *DeCosta*, relying on the much earlier *Hecker* and *Kimberly* decisions, concludes that a limited review by the referring district court judge may be appropriate, it offers no support at all for the contention that review by a judge of a magistrate's decision prior to entry of judgment can possibly be eliminated given the constitutional restraints of Article III. It is these very restraints that caused the *Pacemaker I* panel to conclude that:

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[3] District Court Judge Raymond J. Peltine describing the reference process states: "Order of reference reflects that the parties consented to a hearing and determination by the Magistrate *which, of course, is subject to review by the referring judge.*" *DeCosta v. Columbia Broadcasting System, Inc.*, 383 F.Supp. 326 (1974) (emphasis added).

> Therefore, rather than being exclusively a due process right of the litigants waivable by them, the requirement of an Article III judge is jurisdictional and thus not waivable. (712 F.2d at 1312).

As support for its holding *Pacemaker I* cites *Northern Pipeline* as well as *United States v. Raddatz*, 447 U.S. 667 (1980) and *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). *Glidden* is cited by *Pacemaker I* as an affirmation by this Court of the constitutional right to an Article III judge as distinguished from due process rights. *Glidden* certainly makes this distinction of a claim by petitioners therein that they were denied the protection of judges with tenure and compensation guaranteed by Article III. This Court pointed out that petitioner's claim had nothing to do with the manner in which the non-district court judges conducted themselves:

> *Article III §1*, however, *is explicit* and gives the petitioners a basis for complaint without requiring them to point to particular instances of mistreatment in the record. 82 S.Ct. at 1464 (emphasis added).

To the same effect is *Raddatz* in which defendant claimed that the *de novo* review standard imposed on a district court judge by §636(b) did not provide sufficient scrutiny of a magistrate's decision prior to entry of judgment and therefore violated the Due Process Clause of the Fifth Amendment and Article III of the United States Constitution. This Court agreed with defendant that both of these constitutional rights had to be protected and sustained §636(b) only because "the statute strikes the proper balance between the demands of due process and the constraints of Article III." 100 S.Ct. at 2415. *Pacemaker I* correctly relies on *Raddatz* to demonstrate this Court's conviction that there is an absolute constitutional need for satisfying the "constraints of Article III." *Id.* at 1216.

One of the constraints of Article III is that any dilution of Article III jurisdiction must not threaten the separation of powers. *Pacemaker I* considers the argument that §636(c) does not pose such a constitutional threat because the magistrate referral system is a form of "internal delegation" in which referral decisions are internally made within the judicial branch. The Eighth Circuit has concluded that §636(c) does not threaten the judicial decision maker's independence by apparently accepting the rationale of other circuits that (i) the Magistrates Act does not create new federal courts (ii) a judgment entered upon a magistrate's decision *is* the judgment of the district court (iii) the district court supervises the disposition of consensually referred cases even though *de novo* review is not required and (iv) a magistrate's entry of judgment is no different from a court clerk's entry of judgment in a default or consensual situation. Yet, as the dissenters in this case have strongly argued, §636(c) is a radical departure by Congress from the historical relationship mandated and upheld between non-Article III officers and Article III judges. Without the constraints that Congress itself imposed under §636(b), magistrates can and are, pursuant to §636(c) of the Magistrates Act, entering judgments that are *their* judgments and are doing so without any form of review by a district court judge. This is, as Judge Donald P. Lay, Chief Judge of the Eighth Circuit has said in dissent:

> [A]n unconstitutional delegation, by Congress, of the judicial power of the United States to judges that are not protected by the dictates of Article III.[4]

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[4] 739 F.2d at 1318. On the same point Judge Lay states: "To urge, as *Pacemaker II* and this majority do, that magistrate appointment, case reference and recall, and appellate review is sufficient Article III supervision ignores, I feel, the historical underpinnings of Article III. The magistrate's role is not limited to that of an adjunct. These non-Article III judges have been given power to adjudicate 'laws of national applicability and affairs of national concern.' *Palmore v. United States*, 411 U.S. 389, 408 (1973)." *Id.*

Summary

Congress enacted the Magistrates Act in 1968 and added §636(c) to the Act in 1979 for the express purpose of giving needed assistance to district judges, overburdened by heavy dockets. Certainly the good intentions of Congress are not at issue here nor are the conscientious and significant efforts that magistrates are making to increase the efficient operation of the federal court system. But Congress has gone beyond the constitutionally sustained boundaries of the magistrate referral system established under §636(b). The elimiation by Congress of *de novo* review from the §636(c) process creates a massive constitutional problem which this Court cannot allow to go unfettered.

It is certainly not up to Congress to determine whether Congress acted in a constitutional manner by enacting §636(c). The notion that Congressional hearings on the whole found no constitutional impediment to §636(c) is particularly weak when one considers that the three reasons provided by the House Committee for defending the constitutionality of §636(c) must all be specifically rejected in light of the decisions of this Court handed down in *Northern Pipeline* and *Raddatz* subsequent to §636(c)'s adoption.[5]

As stated below by dissenting Chief Judge Lay:

> If bankruptcy judges and magistrates are to be given Article III authority, they must be made Article III judges. Without the structure of judicial independence mandated by Article III, bankruptcy judges and magistrates fall short

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[5] H.R. Rep. No. 96-287, 96th Cong. 1st Sess. 7-9 (1979) presents the following constitutional defenses: (i) the magistrate is an adjunct of the United States District Court, (ii) both parties must consent to trial before a magistrate and to entry of final judgment by the magistrate and (iii) an appeal from a magistrate's decision lies in an Article III court.

of the authority to exercise the judicial power of the United States. This constitutional fact alone sufficiently denigrates the Congressional attempt to authorize magistrates to render Article III powers. Whether they should be Article III judges is a question for Congress—until they are made so, we should not by judicial fiat perform that act. (739 F.2d at 1319).

II. The Magistrate Erred in Granting Respondent's Motion for Summary Judgment Under Rule 56 Fed.R.Civ.P. Inasmuch as the Record Shows that There are Genuine Issues as to Material Facts.

Although the record shows that there are highly contested questions of fact going to the crucial issues in this case and although the contract in question is so ambiguous as to beg interpretation, the magistrate nonetheless granted and the court below sustained a motion for summary judgment against Petitioner in the sum of $1,953,227.58 plus interest.

In so doing, the court below has affirmed the entry of a summary judgment which not only ignores but which runs counter to every standard and limitation which this Court has established for the proper application of Fed.R.Civ.P. Rule 56.

The Rule itself states that summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The oft quoted position of this Court on the issue is that:

> Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, [and where] no genuine issue remains for trial. . . [for]the purpose of the rule is not to cut litigants off from their right of trial by jury if

they really have issues to try." *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944).

This Court has further established with reference to summary judgments that any doubt regarding the existence of a genuine issue of material fact must be resolved against the movant and that the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *United States v. Diebold,* 369 U.S. 654, 655 (1962) (per curiam).

The appropriate starting point for analysis of the decision below must be with the court's finding that "the magistrate correctly ruled that the terms of the contract [the Retainer Agreement] were clear when read in the context of the entire agreement." (739 F.2d at 1317). Yet a mere reading (or even multiple re-readings) of the contract will demonstrate that this agreement is, on its face, unclear, disorganized, confusing and certainly ambiguous.

The law is that the terms of a contract, if ambiguous, are matters of fact to be determined in the same manner as other facts, by the jury in a jury case. *Eastmount Const. Co. v. Transport Mfg. & Equip. Co.*, 301 F.2d 34 (8th Cir. 1962). "Where the language of [a] contract on its face is not clear or is ambiguous and resort to extrinsic evidence is necessary, if such evidence be conflicting, or, if not conflicting, different conclusions might reasonably be drawn therefrom, the construction of the agreement is for the jury under proper instructions from the Court." *Commerce Trust Co. v. Howard,* 429 S.W.2d 702, 705-706 (Mo. 1968) (emphasis added).

The magistrate herein attempted to downplay the ambiguity of the entire contract, by focusing instead on the following two contractual paragraphs:

> If the Board of Directors of Clark ultimately decided that the sale of the Company [Clark Oil] were in the best

> interests of your shareholders, we [LBKL] would act as your agent in this process for a fee amounting to a .4% of the consideration paid. Such fee is subject to offset for retainer payments described in Section 3, Page Three, hereof but is not subject to the maximum fee set forth in Section III, Page One hereof (the "Percentage Fee Provision").
>
> If a transaction should occur between a Clark director, officer, a stockholder of more than 10% or other affiliated person, including trusts for families of the foregoing, or such person's representative, and a third party, no transaction fee will be paid to LBKL under the terms of this Agreement, unless such transaction is a part of Clark's merger or financial program or unless LBKL has been specifically engaged by Clark by separate written agreement to assist it in such transaction. (Complaint, Ex. A, page 4) (Bracketed language added) (The "Family Transaction Provision").

The very ambiguity of these critical paragraphs is pointed out by the fact that both Petitioner and Respondent have interpreted them as being supportive of their totally opposite positions.[6]

Given the parties' directly contrary positions, it is very much in doubt what the parties intended by phrases such as:

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[6] Petitioner submits that it is obvious that Respondent did not earn a commission under the terms of the Percentage Fee Provision. In addition, a claim to such a commission was specifically excluded, under the circumstances, by the wording of the Family Transaction Provision. When Petitioner was required to respond to the Motion for Summary Judgment which Respondent had initially filed, Petitioner not only opposed that motion but filed its own Motion for Summary Judgment concluding that (1) the very inability of Respondent to present evidence sufficient to support its breach of contract claim would entitle Petitioner to a judgment and (2) the undisputed body of material facts necessary for Respondent to sustain its burden of proof was not present in the record whereas there were sufficient undisputed facts upon which Petitioner could sustain its defendant's burden.

1) "The sale of the Company"
2) "We would act as your agent"
3) "In this process"
4) "Unless such transaction is part of..."
5) "Clark's merger or financial program"

Other portions of the Retainer Agreement not only fail to clarify these provisions but in fact further obfuscate their meaning.

The magistrate, in attempting to himself interpret this ambiguous contract, relied on extrinsic evidence and in so doing invaded the province of the jury by evaluating evidence on which a jury could reasonably reach a variety of different conclusions. This process alone should have warranted reversal of the magistrate's judgment but the appellate court erroneously failed to apply this standard in reaching its decision.

In addition to the ambiguity of the controlling contract, the record in this case demonstrates that there are a number of major areas in which there are genuine issues as to material facts. The most conspicuous example of such an issue relates to Respondent's "acting as the agent of Petitioner." For purposes of summary judgment the question is whether the record reflects a genuine issue as to the supposed fact that Respondent acted as the agent of Petitioner.

There is no evidence that Respondent acted as Petitioner's agent in the sale process. Petitioner has never denied that, during the time period in which a sale of the company was contemplated and ultimately consummated, Respondent was providing financial services to the company. But Respondent was after all under retainer throughout this period to provide services in the specific area of mergers and acquisitions. These services, such as contacting and performing financial studies on other companies, were exactly the type of services for which Respondent had been paid hefty retainer fees in the past

(Manges Depo., p. 59-60) and for which Respondent ultimately was paid, without dispute, a total of $300,000.00 (Affidavit of M.R. Burmaster, attached to Petitioner's Brief in Opposition to Motion for Summary Judgment).

Thus there is a very genuine issue as to whether Respondent's "white knight" search is referable to the contract's Retainer Fee Provision or to the Percentage Fee Provision and whether the evidence in the record shows Respondent acting not only as Petitioner's retained investment advisor but also as the agent of Petitioner. *What is most critical is that these are not questions of law but questions of fact to be determined by a jury.* When facts pertaining to the existence or non-existence of an agency are conflicting, or conflicting inferences may be drawn from the evidence, the question presented is one for the jury. 3 Am.Jur. 2d *Agency* §359 (1962). If Respondent did not act as the agent of Petitioner in the sale of the company, Respondent is not entitled to the .4% fee which the magistrate has awarded it and which award the appellate court has sustained. Clearly the record mandates a determination by a jury of this issue, and a reversal of the motion of summary judgment would be required even if this were the only disputed issue of material fact.

There are, however, additional areas of genuine issue as to material facts in the case. In its Answer, Petitioner stated as an affirmative defense that, all other considerations notwithstanding, the Family Transaction Provision of the contract specifically precluded payment of a .4% commission to Respondent in this case because (1) the sale transaction that actually occurred was exactly the type of family transaction for which Respondent was to receive no percentage fee; (2) the transaction was not a part of "Petitioner's merger or financial program" and (3) Petitioner had not specifically engaged Respondent by separate written agreement to assist it in this transaction. The magistrate determined that the apparent exclusionary language of the Family Transaction Provision was not applicable for the sole reason that the "Apex sales transaction with the Emory Clark Family was a part of Clark's merger or

financial program." (Opinion p. 20). The magistrate stated further that this conclusion was drawn from "the undisputed facts in this action." (Opinion, p. 20). The appellate court determined that this finding of the magistrate was "correctly held." (739 F.2d at 1317).

Yet there are no "facts" to support such a conclusion. Nowhere in the depositions, answers to interrogatories or other discovery documents in this case is there any evidence whatsoever of what "Clark's merger or financial program" was, when it began, who was in charge of it or what its parameters were. Clearly there were representatives of Petitioner and Respondent who explored the possibility of the company's merging with some other company. Certainly there were documents prepared by both sides relating to this topic as well as to Petitioner's finances. But the record before this Court would merely allow inferences to be drawn as to what, if anything, "Clark's merger or financial program" was.

Even if there were no factual dispute as to the nature of this program, there would definitely be one as to whether the transaction between the Emory Clark Family and Apex Oil was a "part" of the company's "program". The evidence of events that took place from May through July 1981 certainly suggest a possible contrary conclusion, namely that the Emory Clark Family/Apex transaction was initiated, negotiated and consummated separate and apart from any program of Petitioner and was not part of such a program.

Petitioner has focused in this Petition on those areas that most vividly point out the error below in sustaining a motion for summary judgment. In reversing such a motion in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), this Court stated that a movant for summary judgment has the burden of showing the absence of a genuine issue as to *any* material fact and that to carry this burden the movant must foreclose even the possibility that there might be such an issue. Respondent has not carried (or even attempted to carry) this burden.

The record shows that every action taken by Respondent vis a vis Apex Oil was to thwart, not encourage, that company's interest in Petitioner. The record shows that every action taken by Respondent regarding other suitors was advisory in nature and covered by a retainer fee rather than by a commission. The record shows a pattern of negotiations between the Emory Clark Family and Apex Oil that reflect a transaction separate from, and not a part of, any *company* merger or financial program. While Respondent takes roughly the same series of events and comes to conclusions different than those suggested by Petitioner, this obviously does not thereby foreclose the possibility that these facts would allow a jury to find for Petitioner on each of the critical issues raises. This is particularly true given this Court's guideline that "on summary judgment the inferences to be drawn from the underlying facts. . . must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold,* 369 U.S. 654, 655 (1962). In *Diebold* this Court reversed a summary judgment entered below because the materials before the lower court raised a genuine issue as to material facts. In explaining its finding this Court said: "A study of the record. . . leads us to believe that inferences contrary to those drawn by the trial court *might* be permissible." *Id.* at 654 (emphasis added).

Petitioner feels confident that a study of the record herein by this Court surely would permit, if not demand, inferences contrary to those drawn by the magistrate and that the summary judgment must therefore be reversed. Petitioner has a right to a jury determination because, in the words of this Court, it "really has issues to try." *Sartor v. Arkansas National Gas Corp.,* 321 U.S. 620, 627 (1944). While Rule 56 has a salutary purpose, it surely was not designed for application in a case such as this. This Court cannot allow this motion for summary judgment to stand given the record and contract before it. To do so would not only result in a harsh injustice to the Petitioner but would also constitute a grave departure from the strict requirements which this Court has consistently upheld to justify a summary judgment.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: September 28, 1984

APPENDIX

APPENDIX 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-484 C(3)

Lehman Brothers Kuhn
Loeb, Inc.,
Plaintiff,

v.

Clark Oil & Refining
Corporation,
Defendant.

JUDGMENT

(Filed June 20, 1983)

This action is before the Court, the Honorable David D. Noce, United States Magistrate, presiding by consent of the parties under 28 U.S.C. §636(c)(3), and the issues having been duly determined upon the parties' motions for summary judgment, and a written opinion having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the motion of plaintiff Lehman Brothers Kuhn Loeb, Inc., for summary judgment be and it is sustained and that plaintiff recover of defendant Clark Oil & Refining Corporation the sum of $1,953,277.58, plus interest from September 17, 1981, plus the costs of the action.

IT IS FURTHER ORDERED that the motion of defendant for summary judgment be and it is denied.

IT IS FURTHER ORDERED that the motion of plaintiff for leave to amend the complaint be and it is denied as moot.

David D. Noce
United States Magistrate

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1874

Lehman Brothers Kuhn Loeb
Incorporated,
Appellee,

v.

Clark Oil & Refining
Corporation,
Appellant.

INTERVENOR

United States for appellee.

Appeal from the United States
District Court for the Eastern
District of Missouri

Submitted: March 9, 1984

Filed: July 11, 1984

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, and BOWMAN, Circuit Judges, *en banc*.

ROSS, Circuit Judge.

The appellee, Lehman Brothers Kuhn Loeb Incorporated, filed a complaint in the United States District Court for the Eastern District of Missouri, seeking damages for an alleged breach of contract and naming as defendant Clark Oil & Refining Corporation. This matter, by consent of the parties, was referred to a magistrate[1] pursuant to 28 U.S.C. § 636(c). The parties each filed a motion for summary judgment and the court granted the appellee's motion. An appeal was filed and argued to a panel of this court which recommended a rehearing before the court en banc because of the importance of one of the issues. In addition to challenging the magistrate's order granting summary judgment, the appellant has put into question the constitutionality of 28 U.S.C. § 636(c). We hold that summary judgment was properly granted and that section 636(c) is constitutional.

I. Section 636(c) of the Magistrates Act.

Section 636(c)(1) provides, *inter alia,* that upon the consent of the parties, and when designated to exercise this jurisdiction by the district court, a magistrate may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case. Section 636(c)(3) allows for a direct appeal to the appropriate circuit court, or should they so agree, the parties may appeal the magistrate's judgment to the district court. 28 U.S.C. § 636(c)(4).

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[1] David D. Noce, United States Magistrate, Eastern District of Missouri.

The appellant bases its challenge to section 636(c) on Article III[2] of the Constitution and on the reasoning expounded in *Pacemaker Diagnostic Clinic v. Instromedix, Inc.*, 712 F.2d 1305 (9th Cir. 1983) (hereinafter *Pacemaker I*). In that case three judges of the Ninth Circuit construed *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) and concluded that Section 636(c) of the Magistrates Act violates Article III of the Constitution because it vests judicial power in courts whose chief officers are not insulated by life tenure and a guarantee that their salaries will not be diminished during their continuance in office. *Pacemaker I* at 1309. En route to this determination, the panel concluded that this grant of power was too extensive to fairly support a characterization of the magistrate as an adjunct of the district court. *Id.* at 1310. The panel also observed that under section 636(c) magistrates were given the power to adjudicate rights which could not fit within the circumference of a traditional exception to Article III—forums for congressionally created substantive rights. *Id.* at 1310.

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[2] Article III, Section 1 reads:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

The panel in *Pacemaker I* decided that section 636(c) could not be saved by analogizing it to an arbitrator's decision and declaring the constitutional issue to be one concerning only due process rights which could be waived by the parties. *Id.* 1310-1312. In addition an argument was rejected which would distinguish section 636(c) from the traditional separation of powers problem because the magistrates remain under the control of the Article III judiciary, the branch whose power is arguably invaded. *Id.* at 1312. Finally, the panel also decided that the availability of appellate review by an Article III court could not cure the constitutional ills it found apparent in section 636(c). *Id.* at 1313.

Unlike the panel in *Pacemaker I,* we do accept some of the arguments outlined above and find that section 636(c) is constitutional. In so doing we share in the conclusion arrived at by the courts[3] in *Pacemaker Diagnostic Clinic v. Instromedix, Inc.,* 725 F.2d 537 (9th Cir. 1984) (*en banc*) (hereinafter Pacemaker II) (reversing *Pacemaker I*); *Collins v. Forman,* 729 F.2d 108 (2d Cir. 1984); *Goldstein v. Kelleher,* 728 F.2d 32 (1st Cir. 1983). As an initial matter we agree with the Third Circuit's determination in *Wharton-Thomas* and find that this issue is not controlled by the Supreme Court's decision in *Northern Pipeline, supra. Id.* at 926. In *Northern Pipeline, supra,* Justice Rehnquist, concurring and joined by Justice O'Connor, specifically limited the extent of the concurrence, and thus the actual holding, to:

> I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit *over Marathon's objection* to be violative of Art. III of the United States Constitution.

Northern Pipeline at 91 (emphasis added). Both parties in this case did affirmatively consent to submit the controversy to a magistrate and *Northern Pipeline* is distinguishable on this ground.

The arguments attacking the constitutionality of section 636(c) draw their essential themes from either of two basic categories: due process or separation of powers. We agree with the court in *Goldstein v. Kelleher, supra,* when it wrote:

> But insofar as Article III protects individual litigants, those protections can be waived. *Cf. Patton v. United States,* 281 U.S. 276, 281 (1930) * * * (waiver of sixth amendment guarantee of trial by jury). The plaintiff as

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[3] In *Puryear v. EDE's LTD,* 731 F.2d 1153, 1154 (5th Cir. 1984), the Fifth Circuit also concluded that section 636(c) is constitutional.

> well as the defendant here voluntarily consented to have this action handled through to judgment by a magistrate. They gave their consent pursuant to procedures designed to insulate this choice from influence by either the district judge or the magistrate. 28 U.S.C. § 636(c)(2).

Goldstein at 35.

The more troublesome arguments are based on the separation of powers aspect of Article III. In this area we are persuaded by the reasoning of the majority in *Pacemaker II* when it drew a distinction between this issue and the "paradigmatic separation of powers case, where the integrity of one branch is threatened by another which attempts an arrogation of power to itself." *Pacemaker II* at 544 (citations omitted). As the majority in *Pacemaker II* went on to note, the various provisions of the Magistrates Act controlling, for example, the appointment of magistrates, *Section 636(a);* reference of cases to, and recall from, magistrates, *Section 636(b)(1) & (c)(6);* and appellate review, *Section 636(c)(4) & (5);* leave Article III courts firmly in control of the system as a whole. *Id.* at 544. In our opinion these mechanisms limit the magistrate's role to that of adjunct, safeguard the integrity of the Article III judiciary, and keep section 636(c) within the bounds set by Article III of the Constitution.

II. The Order Granting Summary Judgment

The appellee, an investment bank, in May of 1979 contracted with the appellant to assist it, first in the sale of certain assets, and subsequently in exploring the possibility of a merger, acquisition, or sale. The appellee was to receive quarterly payments on a retainer of $180,000 per year in exchange for its services. (This amount was subsequently reduced to $100,000 per year.) The contract also included the following provision:

> If the Board of Directors of Clark ultimately decided that the sale of the Company were in the best interests of

your shareholders, we would act as your agent in this process for a fee amounting to .4% of the consideration paid. Such fee is subject to offset for retainer payments described in Section 3, Page Three, hereof but is not subject to the maximum fee set forth in Section III, Page One, hereof.

If a transaction should occur between a Clark director, officer, a stockholder of more than 10% or other affiliated person, including trusts for families of the foregoing, or such person's representative, and a third party, no transaction fee will be paid to LBKL under the terms of this Agreement, unless such transaction is a part of Clark's merger or financial program or unless LBKL has been specifically engaged by Clark by separate written agreement to assist it in such transaction.

In 1979 Apex Oil Company began purchasing the appellant's stock on the open market. The appellee, at the direction of the appellant's management, investigated Apex Oil and prepared a strategy against the uninvited attempt to acquire the company. Unknown to both the management of the appellant company and the apppellee the founder of the company, Emory T. Clark, began negotiations to sell all the stock owned by the Clark family to Apex Oil Company in the spring of 1981.

On July 14, 1981, the board of directors was informed of the negotiations and asked by Emory Clark to release certain nonpublic information to Apex Oil Company. The appellant's board of directors ordered the appellee to continue the search for a "white knight." The appellee's efforts in this endeavor proved unavailing and on July 31, 1981, a representative of Emory Clark requested that the board of directors approve the terms of Apex's proposed tender offer. Following a report prepared by the appellee on the fairness of the offer, the board of directors did approve the offer and recommended acceptance by all Clark shareholders. Apex subsequently purchased nearly all of the outstanding Clark Oil stock.

Following the sale of the stock, the appellee requested payment, pursuant to the quoted portion of the contract, in the amount of $1,953,227.58. That sum represents .4% of the total price of $497,694,396.00, less the retainer deduction of $37,500.00. This demand was refused, suit was filed, and the magistrate granted summary judgment in favor of the appellee, awarding the entire amount claimed. The appellant argues that summary judgment was improperly granted because the contract is ambiguous and material questions of fact remain in issue.

The standards governing summary judgment are well established. Summary judgment is appropriate when there is no genuine issue about material facts and the moving party demonstrates its right to judgment as a matter of law. *Butler v. MFA Life Ins.*, 591 F.2d 448, 451 (8th Cir. 1979). The appellant argues that the contract was ambiguous in that the meaning of the terms "the sale of the Company," "we would act as your agent in this process," and "unless such transaction is part of Clark's merger or financial program," is not clear.

Whether a contract is ambiguous is a question of law which is answered by the application of the following principles:

> The disputed language is to be examined in the context of the entire agreement. It is ambiguous if reasonably susceptible of more than one construction. *Sun Oil Co. v. Vickers Refining Co.*, 414 F.2d 383, 386-87 (8th Cir. 1969). The words of the contract are to be given their plain and ordinary meaning as understood by a reasonable, average person. *In re SEC v. White & Co., Inc.*, 546 F.2d 789, 792 (8th Cir. 1976).

Universal Towing Co. v. United Barge Co., 579 F.2d 1098, 1101 (8th Cir. 1978). After applying these principles to the contract in this case, we are satisfied that no ambiguity exists. In our opinion the magistrate correctly ruled that the terms of the contract were clear when read in the context of the entire agree-

ment. Even under the standards of summary judgment "contracts are subject to construction, however, only when ambiguous and ambiguity cannot be created by the mere assertion of a party to it." *Elbow Lake Coop Grain Co. v. Commodity Credit Corp.*, 251 F.2d 633, 637 (8th Cir. 1958).

The only remaining question is whether the appellee has established that all conditions precedent to its right to a fee of .4% of the consideration were fulfilled. The magistrate ruled that appellee carried this burden and we agree. It is clear that Clark Oil was "sold," because substantially all of the outstanding stock was purchased by Apex. The appellant's board of directors in recommending that the stockholders accept the Apex offer necessarily determined that the sale was in their best interests. The appellee's services in investigating Apex, in searching for a "white knight," and in standing ready to perform other duties at the request of the board, fulfill the condition expressed by the language "would act as your agent in this process." Finally, because the sale of the stock belonging to the Emory T. Clark family trust was integrated with the purchase of stock held by third parties and because the sale of all the stock was accomplished with the cooperation of the board of directors, the magistrate correctly held that the sale of the family stock was a part of "Clark's merger or financial program."

For the foregoing reasons the decision of the magistrate is affirmed.

LAY, Chief Judge, joined by ARNOLD and BOWMAN, Circuit Judges, dissenting in part.

I concur in Judge Arnold's dissenting opinion, but wish to add some additional remarks.

The majority initially notes that the constitutional attacks on the Magistrates Act are derived from two basic Article III concerns: due process and separation of powers. The majority then cites, and agrees with, *Goldstein v. Kelleher*, 728 F.2d 32,

35 (1st Cir. 1984), for the proposition that "insofar as Article III protects individual litigants, those protections can be waived." I agree that consent may be relevant to due process; indeed, if a party stipulates that an abbreviated procedure may govern an adjudicatory finding of any tribunal, it should be obvious that the party cannot complain. If the consensual-referral argument was used only for this proposition, I would have no problem. The cases cited and relied on by the majority, however, go much further.

In *Wharton-Thomas v. United States,* 721 F.2d 922 (3d Cir. 1983), for example, a similar case cited and relied on by the majority, the court stated: "The question in the present case is not whether Congress may constitutionally *delegate* case dispositive authority to a non-Article III officer, but whether the parties may, by consent, have a case tried to judgment before a magistrate." *Id.* at 928 n.9 (emphasis original).[1] I totally disagree with this reasoning. I think the fundamental issue is what the Third Circuit rejects: whether Congress can constitutionally delegate case dispositive authority — which I believe is, in essence, the judicial power of the United States — to a non-Article III officer. Article III adequately addresses this when it delimits where the judicial power may be vested and how the judges therein shall hold office. It should be clear this limitation cannot be exceeded by parties acquiescing in the expansion of judicial authority. Private parties cannot authorize the

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[1] The Ninth Circuit also used broad language in reliance on litigant consent and gave deference to the Third Circuit's conclusion "that consent under § 636(c) cures any constitutional defects." *Pacemaker Diagnostic Clinic of America v. Instromdedix,* 725 F.2d 537, 542 (9th Cir. 1984) (en banc). *See also Goldstein v. Kelleher,* 728 F.2d 32, 34-35 (1st Cir. 1984) ("We agree with the en banc decision of the Ninth Circuit and with an earlier decision of the Third Circuit that section 636(c)(3) is not unconstitutional. . . . As we find little to add to Judge Weis's thorough discussion in *Wharton-Thomas,* we rely in particular on the reasoning in that case . . . .").

judicial power of a constitutional tribunal.[2] The exercise of governmental authority may only be sanctioned by the terms of the charter authorizing it.[3] Therefore, I believe that the concern should not be whether there exists consensual reference to a non-Article III judge, but whether Congress has the constitutional authority to pass such legislation.

My conclusion that Congress may not delegate such authority to a non-judicial officer is supported in large part by *U.S. v. Raddatz*, 447 U.S. 667 (1980). The Supreme Court upheld a statute that permitted the district court to give the magistrate's proposed findings of fact and recommendations such weight as their merit commands and the sound discretion of the judge warrants. The Court held that this delegation of authority to the magistrate did not violate Article III "*so long as the ultimate decision is made by the district court.*" *Id.* at 683 (emphasis added). The saving grace of this delegation — a de novo review by a district court exercising ultimate authority — is glaringly absent here. There exists no Article III de novo review when the parties consent to the jurisdiction of a magistrate under §

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[2] It is well-settled that parties may not by stipulation "invoke the judicial power of the United States in litigation which does not present an actual 'case or controversy.' " *Sosna v. Iowa*, 419 U.S. 393, 398 (1975). The reasoning behind this fundamental premise is that litigants cannot by private agreement transcend the limits of a constitutional government beyond the framework of the Constitution. It is for this fundamental reason that jurisdiction of the federal courts cannot extend beyond that given by the Constitution. It is also for this reason that parties may not consent to subject matter jurisdiction in the federal courts in the same manner that they waive personal jurisdiction or other non-jurisdictional rights. Although we are not concerned with subject matter jurisdiction, we are faced with an analogous argument, that the parties may consent to the exercise of judicial power not otherwise authorized by the Constitution.

[3] As Chief Justice Marshall stated: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 159, 206 (1819).

636(c), and the direct appeal provision to the circuit court is not a saving feature. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86 n.39 (1982) ("Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal . . . .").

To urge, as *Pacemcker II* and this majority do, that magistrate appointment, case reference and recall, and appellate review is sufficient Article III supervision ignores, I feel, the historical underpinnings of Article III. The magistrate's role is not limited to that of an adjunct. These non-Article III judges have been given power to adjudicate "laws of national applicability and affairs of national concern." *Palmore v. United States,* 411 U.S. 389, 408 (1973). This, I feel, is an unconstitutional delegation, by Congress, of the judicial power of the United States to judges that are not protected by the dictates of Article III.

If bankruptcy judges and magistrates are to be given Article III authority, they must be made Article III judges. As Judge Arnold points out, without the structure of judicial independence mandated by Article III, bankruptcy judges and magistrates fall short of the authority to exercise the judicial power of the United States. This constitutional fact alone sufficiently denigrates the Congressional attempt to authorize magistrates to render Article III powers. Whether they should be Article III judges is a question for Congress — until, they are made so, we should not by judicial fiat perform that act.[4]

ARNOLD, Circuit Judge, joined by LAY, Chief Judge, and BOWMAN, Circuit Judge, dissenting in part.

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[4] This statement is not an attempt to endorse vesting Article III status on magistrates or bankruptcy judges. Policy decisions such as this require Congressional balancing of need, budgetary justification, etc. My point is simply that we should not judicially approve measures that do not comport with Article III.

This Court now joins the First, Second, Third, and Ninth Circuits in holding that Congress has not violated Article III by empowering United States Magistrates, with the consent of the parties, to enter judgments with the same force and effect as United States District Judges. In the face of this increasing weight of authority, it requires more than the normal amount of temerity to disagree. Nevertheless, because the issue seems to me so clear and simple, so basic to the whole theory of a written Constitution interpreted by independent judges, I respectfully dissent.

Article III, Section 1, provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Magistrates are appointed by the district courts for a term of years. They are not appointed by the President. They are not confirmed by the Senate. They do not hold office during good behavior. They have only a statute to protect their salaries, and even that protection is good only for the magistrate's current term. They are not, in short, protected from popular disaffection to the extent required by Article III for judges. Yet, the Court today holds that they may decide whether to enter judgment, and for whom, in this diversity case arising under the law of Missouri, a case that undeniably falls within the "judicial Power of the United States."

The reasoning employed to justify this result is an attempt to make a simple case complex. For whatever may be said about "adjuncts" of the district courts, however hopeful one may be that Congress will not in practice attempt to curtail the in-

dependence of magistrates, the fact remains that officers without Article III protection are exercising the judicial power in the most basic sense. They are deciding who should win cases, and entering judgments accordingly.[1] What need is there of any more United States District Judges, if this expedient is upheld?

I am not satisfied with the answer that all is cured by the parties' consent. Article III is concerned with more than fairness to the parties in any given case. It goes to the heart of our form of government, which is based in part on the conviction that there are some things that a majority of the people cannot do, and that cases should turn on the law, the facts, and the conscience of the judge, and on nothing else.

All of this is not to deprecate in any way the talent and diligence of our magistrates. They do tremendous service in the cause of justice every day. (Indeed, perhaps they should be given Article III status, in which event the present issue would disappear.) But the facts of human nature, so well known and thoroughly distrusted by the Framers of our Constitution, require the conclusion that officers so exposed to outside pressure may be unduly tempted to avoid unpopular decisions. And if there is any lesson that is plain from our constitutional history, it is that judges who conscientiously apply a written Constitution are not always popular. It was Alexander Hamilton who said:

> The complete independence of the courts of justice is peculiarly essential in a limited constitution.

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[1] The Magistrates Act is limited to civil cases, and even there does not include the contempt power. 28 U.S.C. §636(e). But there is nothing in today's decision that would prevent Congress from assigning contempt proceedings and criminal cases also to magistrates. As the United States conceded at the oral argument in this case, Article III, Section 1, contains no language that would justify a distinction between civil diversity cases and prosecutions for federal felonies.

The Federalist No. 78, at 525 (Cooke ed. 1961).

Much has been written on both sides of this question. A fuller argument in this dissenting opinion would unduly cumber the pages of the reports. I content myself by referring the reader to Judge Schroeder's excellent dissenting opinion in *Pacemaker II*, 725 F.2d at 547-55.

I respectfully dissent.[2]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[2] I agree with the Court's holding on the merits of this appeal, and join that portion of its opinion.